IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

Crl. Appeal No. 622 of 2001 , decided on 04.4.2002
(Old No. 2323/1989)

Kaislash Chandra Vs. State

A.F.R. (Approved for reporting)
Not approved for reporting

Date 04.4.2002 Initials of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

(Court No. Hon.C.J.'s Court Old Block)

Criminal Appeal No.622 of 2001

(Old Criminal Appeal No. 2323 of 1989)

Kailash Chandra … Appellant.

Versus

State … Respondent.

Hon'ble Irshad Hussain J.

This appellant Kailash Chandra was tried in the S.T.No.215 of 1988, State Versus Kailash Chandra, u/s 20 read with Section 8 of Narcotic Drugs And Psychotropic Substances Act, 1985 (for short, the Act), P.S. Mallital, District Nainital in the Court of Special Judge/Additional Sessions Judge, Nainital on the allegation that the appellant was carrying with him ½ kg. of Charas at about 2:45 P.M. on 6.4.1988 at Thandi Sarak, near Summer House, Mallital within the circle of Police Station Mallital, District Nainital and thereby committed an offence punishable under Section 20 read with Section 8 of Act . The appellant had pleaded not guilty and denied possession of the contraband.

In order to prove its case, the prosecution had examined arresting officers S.I. V.P.Sharma and S.I. Arvind Singh Rawat besides a public witness Mohan Lal, who have supported the prosecution version. The prosecution had also examined Investigating Officer S.I. Anand Singh Kathait, who proved the steps taken towards the investigating of the case. The report of the chemical examiner was tendered in evidence as Ext.Ka.7. On chemical examination, the sample of the contraband recovered from the appellant was found to be at Charas.

The defence version about false implication was disbelieved as an afterthought and the learned Addl. Sessions Judge, therefore, convicted the appellant under section 20 of the Act and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs. One lac.

The learned counsel for the appellant had challenged the conviction of the appellant mainly on the ground that there has not been compliance of the provision of Section 50 of the Act and that this aspect in itself is sufficient to set aside the judgment of guilt and conviction of the appellant. On the other hand, it was submitted on behalf of the State by the learned Government Advocate that the plea as to the non-compliance of the statutory provision of the Act was not agitated before the learned Additional Sessions Judge and therefore, the judgment in appeal does not suffer from any vice of illegality.

At the outset, it need to be pointed out that legal plea as to non-compliance of a statutory provision can very well be raised for the first time in appeal. On this point, learned counsel for the appellant has placed reliance on the decision of Hon'ble Supreme Court in **Babu Versus State of Kerala (AIR 1999 S.C., 3861)**, and wherein the Hon'ble Judges of the Supreme Court have held that plea of non-compliance of Section 50 can be raised for the first time in appeal. There can be no doubt that his principle fully applies of the facts of the case and even if the plea in regard to the non-compliance of Section 50 was not raised earlier, the import of the same can very well be seen and considered her in this appeal.

In regard to the provision of Section 50 of the Act, it need to be mentioned that before the search of the person is made, such person should be informed that if he so requires, he would be produced before a Gazetted officer or a Magistrate for his search. Failure to inform so and failure to take him to the Gazetted officer or the Magistrate, on making such request would amount to non-compliance of Section 50. It is settled principle of law that non-compliance of Section 50 of the act vitiates the conviction and sentence of an

accused where the conviction has been recorded only on the basis of the possession of the contraband article. However, for reference, the Constitution Bench Judgment of the Hon'ble Supreme Court in the matter of **State of Punjab Versus Baldev Singh etc. (1999 S.C. 2378)** relied upon by the learned counsel for the appellant need mention here. In this background the evidence of the prosecution make it abundantly clear that the compliance of provision of Section 50 of the Act was not made when the appellant-accused was arrested and the contraband Charas was allegedly recovered from him. In the memo. of arrest and recovery (Ext.Ka.1), there is absolutely no mention of the fact of the statutory right being made known to the appellant although there was prior information from the police informer that the appellant would be passing through the place of occurrence with contraband Charas. When there is no evidence of giving information of the above right to the appellant the question of taking him the Gazetted officer or the Magistrate does not arise and therefore, it is established that the compliance of the provision of Section 50 of the Act has not been made in this case and this has the effect of rendering the recovery of the contraband article suspect and it vitiates the conviction and sentence of the appellant. Consequently the judgment of conviction and sentence of the appellant cannot be sustained and the same is liable to be set aside.

In short this appeal succeeds and is allowed accordingly. The conviction and sentence record vide order dated 29.09.1989 are hereby set aside. The appellant Kailash Chandra is held not guilty and acquitted of the charge under section 20 read with Section 8 of the Act. He is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.

04.04.2002 **(Irshad Hussain, J.)**

B.C.Bhagat